Lib.

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE VARIANCE PERMIT ISSUED BY SNOHOMISH COUNTY TO MR. AND MRS. DEAN O. MAHER, JUDITH A. STRAND, Appellant, v. SNOHOMISH COUNTY, DEAN O. and L. CARYANN MAHER, and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondents.	SHB No. 85-4 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the request for review of a shoreline variance permit issued by Snohomish County to Mr. and Mrs. Dean O. Maher, came on for hearing before the Shorelines Hearings Board, Lawrence J. Faulk, Gayle Rothrock, Wick Dufford, and Rodney M. Kerslake, Members, convened at Stanwood, Washington, on November 20, 1985. Administrative Appeals Judge William A. Harrison presided.

Appellant Judith Strand appeared and represented herself. Respondent Dean O. Maher and L. Caryann Maher appeared and represented themselves. Respondent Snohomish County appeared by Gordon W. Sivley, Deputy Prosecuting Attorney. Respondent Department of Ecology appeared by Allen T. Miller, Jr., Assistant Attorney General. Reporter Leslie Mitchell recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

This matter arises at Sunday Lake near Standwood in Snohomish County.

II

In 1973-74, respondents Mr. and Mrs. Maher located their home on two waterfront lots in the plat of Sunday Lake. During that time they planned and installed a septic tank and drainfield as well. The building set back from the lake was 25 feet under the zoning code in effect at that time.

III

Thereafter, in September, 1974, Snohomish County adopted its Shoreline Master Program (SCSMP). This was approved by the Department of Ecology as a component of the State Shoreline Master Program on December 27, 1975. WAC 173-19-390. Sunday Lake is within the purview of the Shoreline Management Act and is listed as such at

WAC 173-20-640.

IV

The SCSMP adopted by Snohomish County designates the shoreline of Sunday Lake as "conservancy" and imposes a residential setback of 100 feet. SCSMP Map Number 2 of Section M and Residential Development Regulations - Conservancy (2.) at p. F-54.

V

On August 6, 1984, Mr. and Mrs. Maher applied to Snohomish County for permission to vary the 100-foot setback by requesting to build a garage to within 68 feet of the lake. The garage was to be 20 feet wide and 40 feet long.

VI

In addition to the SCSMP Snohomish County has adopted Title 21 of its County Code entitled "Shoreline Management Permits for Developments on Shorelines of the State." At Section 21.16.040 it provides that upon receipt of a variance application, notice of the same shall be mailed to:

> ...the latest recorded real property owners, as shown by the records of the County Assessor within three hundred feet of the boundary of the property upon which the...variance is proposed.

VII

In this case, Mr. and Mrs. Maher's property is adjacent to a community tract in which owners of platted lots hold an undivided interest. The ownership of the community tract is shown by the records of the Snohomish County Assessor. The names of owners of the

community lots were available to the County and the applicant, but, by their agreement, notice of the application was mailed only to those whose exclusively-owned lots were within 300 feet of the boundary. Among this latter group, one Mr. Chernich should have been included but was not. Consequently, Mr. Chernich was uninformed of the application until after it had been acted upon by Snohomish County. Had he been informed, he would have spoken against the measure when it came before the County.

VIII

Appellant, Mrs. Strand, did not receive notice of the application by mail, though a co-owner of the community lot. She learned of the application otherwise, and in time to communicate her opposition to Snohomish County before the application was acted upon.

IX

The SCSMP sets forth the following standard for shoreline variances:

> Variances
>
> Variances deal with specific requirements of the Master Program, and their objective is to grant relief when there are practical difficulties or unnecessary hardship if the strict letter of the Master Program were carried out. The applicant must show that if he complies with the provisions of the Master Program he cannot make any reasonable use of his property. The fact that he might make a greater profit by using his property in a manner contrary to the intent and provisions of the Program is not a sufficient reason for variance approval. A variance will be granted only after the applicant can demonstrate the following:
>
> 1. The hardship which serves as the basis for granting the variance is specifically related to

the property of the applicant and does not apply generally to other property in the vicinity in the same Environment;

2. The hardship results from the application of the requirements of the Shoreline Management Act and Master Program and not from deed restrictions or the applicant's own actions;

3. The variance, if granted, will be in harmony with the general purpose and intent of the Master Program;

4. Public welfare and interest will be preserved; if more harm will be done to the area by granting the variance than would be done to the applicant by denying it, the variance shall be denied.

All applications for variances and conditional uses shall be forwarded to the Department of Ecology, pursuant to WAC 173-16-070, for final approval or disapproval. No approval or disapproval shall be considered final until same has been acted upon by the Department of Ecology. (Emphasis added.) SCSMP at p. F-4.

X

Title 21 of the Snohomish County Code also sets forth a standard for shoreline variances. It provides, in pertinent part:

...

2) Variance permits for development that will be located landward of the ordinary high water mark, except within those areas designated as marshes, bogs or swamps, pursuant to WAC 173-22, shall be authorized only if the applicant can demonstrate all of the following:

a) That the strict application of the bulk, dimensional or performance standards set forth in the master program precludes or significantly interferes with a reasonable permitted use of the property;.... (Emphasis added.) Section 21.20.030.

Title 21 has not been approved by Department of Ecology, as has the

SCSMP, for inclusion in the State Shoreline Master Program, Chapter 173-19 WAC.

XI

Snohomish County granted the requested variance on November 21, 1984. In doing so it imposed conditions reducing the size of the garage to 20 feet by 32 feet.

XII

The key factor necessitating a variance of the 100-foot setback in this case is the location of the applicant's septic drainfield. The applicants also have a reserve septic drainfield which, if adopted as the main drainfield, might allow construction of a garage without need of variance. A pump would be required to adapt the reserve drainfield to regular use. Such pumps are not uncommon in the area.

XIII

Appellant filed her request for review of the variance on February 20, 1985, which is the matter now before us.

XIV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted a such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

Standing. Respondents first raise the issue of whether appellant has standing to raise the issue of notice of the variance application to others in light of her participation at the County level.

Appellant has such standing. We think this is inherent within the meaning of RCW 90.58.180 that "any person aggrieved by the granting, denying or rescinding of a permit on shorelines...may seek review from the Shorelines Hearings Board...." We conclude that appellant is aggrieved by the granting of the permit, as conceded by the County with regards to substantive considerations. Once so aggrieved we would not sever a procedural issue such as notice and then make a separate determination of standing for that severed issue. Were we to do so however, the result would be the same since, as will be held below, notice provisions serve a broader constituency than only the appellants before this Board.

II

Notice. There are two questions to be answered where notice is the issue. First, was there substantial compliance with the legal notice requirements? See Save Flounder Bay, et al. v. City of Anacortes and Mousel, SHB No. 81-15 (1982). Second, if the answer to the first question is negative, did prejudice result? Where such prejudice has been shown, the permit in question will be reversed. Save, supra, and Schwinge v. Town of Friday Harbor, SHB No. 84-31 (1985). Where no such prejudice is shown, the permit will not be reversed on that ground. The Other Side v. Sumner, SHB No. 84-9 (1985). However, the prejudice which may be shown is not confined to that which may be suffered by an appellant before us; rather, it may be shown on the record before us that third-persons who were entitled to notice did not receive it, and were thereby prejudiced. Schwinge,

supra.

III

In this case, the notice requirements of Snohomish County are set forth at Section 21.16.040 (see Finding of Fact VI, above). We review this matter under RCW 90.58.140(1) which requires developments to conform with applicable regulations. This notice requirement was not substantially complied with in that notice was not mailed to each record owner of the community tract adjacent to the site. Further, it was not mailed to Mr. Chernich who is a record owner of real property within the distance prescribed by the rule. Prejudice was shown by the testimony of Mr. Chernich. The variance permit was issued upon defective notice, and should be reversed on that ground.

IV

Variance. In this case there are three separate standards governing variance: 1) the SCSMP, 2) Title 21 of the Snohomish County Code, and 3) WAC 173-14-150. The latter two are substantially the same. In Simchuck v. Department of Ecology, SHB No. 84-64 (1985), we reviewed the coordination rule adopted by Department of Ecology which provides:

> Pursuant to RCW 90.58.100(5) and 90.58.140(3), the criteria contained in WAC 173-14-140 and 173-14-150 for shoreline conditional use and variance permits shall constitute the minimum criteria for review of these permits by local government and the department. Local government and the department may, in addition, apply the more restrictive criteria where it exists in approved and adopted master programs. (Emphasis added). WAC 173-14-155.

We held that the word "may" does not confer an option upon the DOE or

local government to elect whether to enforce a more stringent variance standard adopted in a master program. We construed the last sentence of WAC 173-14-155 above to mean that more stringent criteria may be applied if part of an approved master program and may not be applied otherwise. This is the only interpretation of the rule which is consistent with the requirement of RCW 90.58.100(5) that each master program shall contain provisions to allow for varying and RCW 90.58.140(1) that no development shall be undertaken except those which are consistent with the applicable master program.

Because the Shoreline Act requires variance criteria to be contained in master programs, the variance provisions of Title 21 are not applicable regulations for purposes of our review or otherwise.

V

Here, both DOE and local government apparently appplied the less stringent standard of Title 21 and WAC 173-14-150 that there be a significant interference with a reasonable use (see Finding of Fact X, above). However, the correct standard is the more stringent one of the applicable master program (SCSMP) that allows variance only where the applicant can meet the severe threshold test of showing that if he complies with the provisions of the master program, he cannot make any reasonable use of his property. The variance applicants here have not met that test. Accord, see Simchuck, supra, Green v. Bremerton, SHB No. 81-37 (1982), Pier 67, Inc. v. Seattle and DOE, SHB No. 81-13 (1981), Kargianis v. Mason Co., SHB No. 78-44 (1979) and Limantzakis v. Seattle, SHB No. 78-10 (1978). The variance permit is inconsistent

with the applicable variance standard and should be reversed.

VI

There is some indication by the adoption of Title 21 that Snohomish County wishes to adopt a less stringent rule for shoreline variances. Our role, however, is not to make that policy but to rule under the policy presently adopted. Presently, Snohomish County has an operative variance rule within its shoreline master program. The proper procedure for adopting a new variance rule conforming to RCW 90.58.100(5) is to amend the shoreline master program.

VII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

The shoreline variance permit issued by Snohomish County to Dean O. Maher is hereby reversed.

DONE at Lacey, Washington, this 31st day of December, 1985.

SHORELINES HEARINGS BOARD

12/30/85

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice Chairman

WICK DUFFORD, Lawyer Member

RODNEY M. KERSLAKE, Member

WILLIAM A. HARRISON
Administrative Appeals Judge